# STATE OF MICHIGAN

# COURT OF APPEALS

DON SOBIESKI,

Plaintiff-Appellant,

v

TAKATA SEAT BELTS, INC., and RENEE YEUTTER,

Defendants-Appellees.

UNPUBLISHED
August 8, 2006

No. 268366
Oakland Circuit Court
LC No. 05-063900-CD

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

Plaintiff, Don Sobieski, appeals the circuit court's order that granted defendants' motion for summary disposition under MCR 2.116(C)(10). We affirm.

## I. Facts and Procedural History

Sobieski worked as a project engineer to develop seat belt and restraint systems for defendant, Takata Seat Belts, Inc. (Takata). Sobieski worked for Takata since 1987 and was terminated on October 28, 2004. Defendant, Renee Yeutter, was the supervisor of the engineering group, of which Sobieski was a member.

As part of her supervisory responsibilities, Yeutter completed routine performance evaluations for Sobieski and the other engineers in the group. Yeutter's first evaluation of Sobieski occurred in May 2003, and the evaluation was positive overall regarding Sobieski's performance. However, when Yeutter re-evaluated Sobieski in July 2004, Yeutter noted significant performance deficiencies. As a result, Yeutter placed Sobieski on a performance improvement plan, with reviews to be conducted every 30 days. Yeutter specifically noted that Sobieski failed to timely address client concerns and failed to submit accurate engineering orders. She further observed that Sobieski implemented engineering changes without proper validation which resulted in product safety concerns, delays in manufacture, and client dissatisfaction. Yeutter also stated that Sobieski had production and quality of work problems and an inability to interact effectively with clients.

Sobieski contends that his discharge was the result of age discrimination by Yeutter and that Yeutter retaliated against him because he complained about Yeutter's use of profane language and inappropriate physical contact with other employees. Specifically, Sobieski

asserted that Yeutter repeatedly used foul language and that she had to be "counseled" about her behavior. Yeutter maintains that she did not know that Sobieski complained about her language and she denied that she ever engaged in any inappropriate physical contact with other members of Takata's staff.

Sobieski also asserted that he heard Yeutter murmur approximately three comments under her breath and he interpreted the remarks as negative statements about his age. Specifically, Sobieski claims that Yeutter stated that, "She can't work with older guys," and that "These guys just won't work and we've got to get more young people in here." Sobieski indicated that Yeutter also commented that "The younger ones feel better or normal." Sobieski recalled that Yeutter made the remarks in close proximity to him and another older employee, Ron Holler. However, Yeutter did not direct the comments to any particular staff member and she made the alleged comments six months before Sobieski was placed on the performance improvement plan. Sobieski acknowledged that he had difficulty with Yeutter's management style and he described her as controlling.

Yeutter testified that her supervisor, Ahad Zadeh, told her about problems with the engineering group and Zadeh specifically directed her to watch Sobieski's performance. Zadeh was not pleased with Sobieski's work and suggested his termination. Yeutter asserted that she did not want to terminate Sobieski and she made a concerted effort to retain him by placing him on the performance improvement plan. Yeutter further testified that she assigned Sobieski a co-op student to assist him, in the hope that it would improve his output and work quality. Nonetheless, Zadeh continued to indicate that Sobieski should be replaced.

At around the same time, Sobieski reportedly made a significant error on a project for GM because he failed to inspect a vehicle's seat belts and it was later discovered that the seat belts did not lock. Yeutter met with Zadeh and another Takata administrator, Patrick Giampaolo, and Zadeh instructed Yeutter to terminate Sobieski. Giampaolo confirmed that he, Zadeh, and other supervisors had been monitoring Sobieski's performance for a two-year period prior to his discharge due to "performance problems." Giampaolo indicated that Yeutter had resisted terminating Sobieski and sought to improve Sobieski's performance by setting up specific goals and objectives. When Sobieski did not meet the performance objectives, he was terminated at Zadeh's direction.

Sobieski denies that he had any performance deficiencies and he maintains that they are a ruse or pretext for his discharge. Sobieski further contends that other, younger engineers had deficiencies in their work that caused problems with GM or other clients but, unlike Sobieski, they did not receive negative evaluations and were not placed on performance improvement plans.

When it granted summary disposition in favor of defendants, the trial court ruled that Sobieski "failed to set forth facts sufficient to prove a prima facie case of age discrimination." The trial court further ruled that Sobieski failed to show that Yeutter made the decision to terminate him or that she made discriminatory comments. According to the trial court, Sobieski also failed to establish that the proffered reason for his dismissal was pretextual. The trial court rejected Sobieski's claim of retaliation because he did not show that Sobieski's complaint about Yeutter's behavior was a significant factor in his termination. Further, the court granted defendants summary disposition on Sobieski's claim under the Bullard-Plawecki Employee

Right to Know Act based on the undisputed fact that defendants provided Sobieski's counsel with a copy of his personnel file and there is no time limitation for compliance in the act.

## II. Analysis

### A. Standard of Review

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. Specifically:

> A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support of a claim. After reviewing the evidence in a light most favorable to the nonmoving party, a trial court may grant summary disposition under MCR 2.116(C)(10) if there is no genuine issue concerning any material fact and the moving party is entitled to a judgment as a matter of law. [*Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001).]

However, the nonmoving party must go beyond the pleadings to offer specific facts and evidence to demonstrate that a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(5). A genuine issue of material fact is deemed to exist when the record maintains as open an issue upon which reasonable minds might differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

### B. Age Discrimination

As noted, Sobieski alleges that Yeutter and Takata violated the Michigan Civil Rights Act, which provides, in relevant part:

> An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . age . . . . [MCL 37.2202(1)(a).]

When asserting a claim for age discrimination, a litigant must prove that he not only suffered an adverse employment action, *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 362; 597 NW2d 250 (1999), but that age was a factor in the adverse employment decision, *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001). A plaintiff may use either direct or circumstantial evidence to prove unlawful discrimination. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). Direct evidence is defined as evidence that, if believed, necessitates the conclusion that unlawful discrimination was a motivating factor in the adverse employment action. *Id.* at 133. "In addition, a plaintiff must prove her qualification or other eligibility for the position sought and present direct proof that the discriminatory animus was causally related to the adverse action." *Id.* To avoid liability, a defendant must show that "it would have made the same decision even if the impermissible consideration had not played a role in the decision." *Id.* (citation omitted).

Sobieski asserts that Yeutter's alleged comments constitute direct evidence of discrimination. Specifically, Sobieski cites three comments that suggested a preference for younger workers. Again, however, the alleged comments were not made in reference to a particular employee and were allegedly made six months before Yeutter placed Sobieski on the performance improvement plan and almost eight months before Sobieski was terminated.

Statements that are simply "stray remarks" do not constitute direct evidence of discrimination. *Sniecinski, supra* at 136. Our courts have identified five factors to determine whether remarks are "stray" or if they constitute direct evidence of discrimination:

> (1) whether they were made by a decision maker or an agent within the scope of his employment, (2) whether they were related to the decision-making process, (3) whether they were vague and ambiguous or clearly reflective of discriminatory bias, (4) whether they were isolated or part of a pattern of biased comments, and (5) whether they were made close in time to the adverse employment decision. [*Id*. at 136 n 8.]

Here, Yeutter's alleged remarks do not constitute direct evidence of discrimination. Sobieski has not shown that the statements were, in any manner, related to the decision to discipline or terminate him. The remarks were not directed to anyone in particular or any specific topic or discussion regarding the hiring or termination of an employee. Moreover, Yeutter allegedly made the statements several months before Sobieski experienced any adverse employment action and, on the basis of Sobieski's own description of the remarks and their context, they were isolated and "vague and ambiguous" in nature.[1]

Sobieski further contends that, before Yeutter became his supervisor, his evaluations were positive and raised no issues or concerns regarding his work. Zadeh, who previously supervised Sobieski, disputes this and maintains that his prior evaluation of Sobieski contained comments indicating a need for improvement. Sobieski does not dispute that his initial evaluation by Yeutter was positive overall. Rather, to show bias, Sobieski relies on the second performance evaluation completed by Yeutter, which led to Sobieski's placement on a performance improvement plan. However, as Zadeh explained, during the second evaluation period, Sobieski began work on a different project "that demands a lot of accuracy, quantity

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[1] We respectfully note that the dissent colleague fails to analyze the alleged comments within the framework set forth by our case law. Again, while, in isolation, the alleged comments refer to age, they were vague, admittedly indirect and remote in time, and no evidence establishes that they were related to Sobieski's termination. Accordingly, contrary to the dissent's conclusion, the alleged remarks do not constitute direct evidence of discrimination. Indeed, such distant and indirect comments simply cannot "necessitate[] the conclusion that unlawful discrimination was a motivating factor in the adverse employment action." *Sniecinski, supra* at 133. Further, Sobieski was required, but failed to "present direct proof that the discriminatory animus was causally related to the adverse action." *Id*. Therefore, we must conclude that Sobieski failed to establish his claim.

output, customer input, interface, internal and external," Yeutter evaluated Sobieski "based on what he was doing at that time."

Sobieski argues that Yeutter's affidavit, in which she denied that she was the ultimate decision-maker in his termination, is self-serving and contradicts her deposition testimony in which Yeutter stated that she terminated Sobieski. It is well established that "parties may not contrive factual issues merely by asserting the contrary in an affidavit after having given damaging testimony in a deposition." *Dykes v Wm Beaumont Hosp,* 246 Mich App 471, 480; 633 NW2d 440 (2001). In her deposition, Yeutter noted several reasons for Sobieski's termination and acknowledged she was physically present and was involved in the actual procedural firing of plaintiff. However, throughout her deposition, Yeutter stated that certain employment decisions regarding transfer, promotion, and termination of employees were actually Zadeh's responsibility. Not only does this undermine Sobieski's assertion that Yeutter's affidavit contradicts her testimony, Zadeh also testified that he was the ultimate decision-maker regarding Sobieski's termination and Giampaolo's affidavit confirms this point. Because Zadeh made the decision to terminate Sobieski and Sobieski made no claim of discriminatory treatment by Zadeh, Sobieski has failed to support his claim that his discharge was related to any form of discrimination or bias based on age.

Because Sobieski cannot provide direct evidence of age discrimination, he was required to follow the burden-shifting approach outlined in *McDonnell Douglas Corp v Green,* 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Hazle, supra* at 462-463; *Sniecinski, supra* at 133-134. This Court has previously adopted the procedure delineated in *McDonnell Douglas* for use in age discrimination claims brought pursuant to the Michigan Civil Rights Act. *Lytle v Malady (On Rehearing),* 458 Mich 153, 172-178; 579 NW2d 906 (1998). In accordance with the standards set forth in *McDonnell Douglas,* plaintiff must demonstrate:

> 1) he belonged to a protected class; 2) he suffered an adverse employment action; 3) he was qualified for the position; and 4) that others who were outside the protected class and similarly situated were not affected by the adverse conduct of the employer. [*Id.* at 172-173.]

If a plaintiff can successfully demonstrate these factors, there is a presumption of unlawful discrimination. *Id.* At issue here is the fourth factor.[2]

Sobieski does not assert or establish that he was replaced by a younger worker. Rather, he claims that Yeutter and Takata treated younger engineers more favorably. According to Sobieski, younger engineers were not subject to disciplinary action or adverse employment decisions despite deficiencies in their job performance. However, defendants presented evidence

[2] In reference to Sobieski's qualification for employment, the fact that he did not hold an engineering degree does not establish that he was unqualified to retain his position. Takata knew this fact when it hired Sobieski and his lack of degree was not cited as a reason for terminating him, but was merely noted as a factor that could have affected Sobieski's work.

that younger employees *were* placed on performance improvement plans and left the company, and Sobieski did not rebut this evidence.[3]

Sobieski has also failed to establish that the younger employees were similarly situated. A plaintiff "is required to show that 'all of the relevant aspects' " of a coworker's employment situation are "'nearly identical'" to those of the plaintiff's situation. *Smith v Goodwill Industries of West Michigan, Inc,* 243 Mich App 438, 449; 622 NW2d 337 (2000). Though Sobieski and the younger engineers worked under the same job description, they were assigned different supervisors and responsibilities with regard to various projects. Sobieski failed to show that their respective responsibilities on the projects were the same or that the alleged deficiencies in performance were of an equivalent priority or nature. Sobieski also failed to rebut Yeutter's statements that Takata disputed the complaints from GM about projects handled by younger engineers. Further, Sobieski did not rebut evidence that, contrary to Sobieski's cited performance deficiencies, the alleged deficiencies of the younger engineers did not involve violations or failure to follow Takata's own engineering procedures.

Were we to find that Sobieski satisfied the required elements of *McDonnell Douglas*, defendants also have "the opportunity to articulate a legitimate nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case." *Hazle, supra* at 464. "If a defendant produces such evidence, the presumption is rebutted, and the burden shifts back to the plaintiff to show that the defendant's reasons were not the true reasons, but a mere pretext for discrimination." *Sniecinski, supra* at 134.

Here, Yeutter cited Sobieski's numerous performance deficiencies in the execution of his job duties. While Sobieski denied any problems with his performance, he failed to present any evidence to rebut Yeutter's testimony and documentation evidencing ongoing concerns with Sobieski's performance at Takata. A plaintiff can establish that a defendant's reasons for termination are pretextual "(1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision." *Dubey v Stroh Brewery Co,* 185 Mich App 561, 565-566; 462 NW2d 758 (1990). Sobieski has failed to show defendants' stated reasons for his termination are pretextual or that circumstantial evidence of bias, including Yeutter's alleged comments or the alleged disparate treatment of younger employees, was causally related to his termination. Accordingly, Sobieski's theory that his performance deficiencies were pretext for age discrimination amounts to mere speculation and conjecture.

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[3] The dissent correctly observes that an older employee, Ron Holler, was also discharged. However, it is important to note that Holler was terminated more than fifteen months before Sobieski and defendants presented unrebutted evidence that Holler was fired because of customer complaints and problems with testing and tooling design. Therefore, clearly this does not raise an inference that Sobieski was terminated because of his age.

C. Retaliation

Sobieski further contends that Yeutter terminated him in retaliation for his complaint about her use of profanity at work. Yeutter acknowledged that she was counseled about her language, but she denied that she was disciplined and she denied any knowledge that plaintiff initiated the complaint.

To establish a claim of retaliatory discharge, a party must prove: "(1) she was engaged in a protected activity, (2) the defendant knew of the protected activity, (3) the defendant acted adversely to the plaintiff, and (4) the protected activity caused the adverse employment activity." *Lamoria v Health Care & Retirement Corp*, 230 Mich App 801, 818; 584 NW2d 589 (1998), opinion vacated July 24, 1998; opinion reinstated in part by 233 Mich App 560; 593 NW2d 699 (1999). The burden is on plaintiff to demonstrate a causal connection between the protected activity and the adverse employment action. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 470; 606 NW2d 398 (1999).

Were we to conclude that Sobieski's internal complaint was sufficient to give rise to a retaliatory discharge claim, he has not shown a causal connection between the filing of the complaint and his discharge. Indeed, even a temporal connection between Sobieski's complaint and the adverse employment action is tenuous because Sobieski complained about Yeutter in March 2004, approximately seven months before Sobieski's termination. Moreover, Sobieski has not established any other connection to his discharge. Accordingly, the trial court correctly dismissed Sobieski's retaliation claim.

D. Bullard-Plawecki Employee Right to Know Act

Sobieski contends defendants violated the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 *et seq.*, by not providing him a copy of his employment file within a reasonable time frame. MCL 423.503 requires an employer, upon receipt of a written request from an employee, to provide the employee an opportunity to review the employee's personnel file "at a location reasonably near the employee's place of employment and during normal office hours." In addition, MCL 423.504 permits an employee to obtain a copy of their personnel file following a review, conducted in accordance with MCL 423.503, or to obtain a copy of the file:

> If an employee demonstrates that he or she is unable to review his or her personnel record at the employing unit, then the employer, upon that employee's written request, shall mail a copy of the requested record to the employee.

In his complaint, Sobieski did not assert that he requested the opportunity to review his personnel file in accordance with MCL 423.503. Rather, Sobieski merely complains about the delay between his attorney's written request for a copy of his employment file and the response by Takata and it is undisputed that Takata provided a copy of the file to Sobieski's counsel. As noted by the trial court, the act fails to delineate a time frame for compliance. However, we find it more significant that Sobieski fails to allege that he requested to review his file pursuant to MCL 423.504, which is required before requesting a copy of the file. Sobieski did not offer any evidence to show that he was unable to review his record at the employer's location, in compliance with MCL 423.504, before his attorney requested the copy. Based on Sobieski's own failure to comply with statutory requirements, Takata was under no obligation to produce a

copy of Sobieski's personnel record when it received the written request from Sobieski's counsel. Therefore, the trial court correctly granted summary disposition to defendants on this issue.

Affirmed.

/s/ Henry William Saad
/s/ Jessica R. Cooper